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June 25, 2020

SUBMITTED VIA E-MAIL TO: 404gESAconsultation@epa.gov

Docket ID No. EPA–HQ–OW–OW–2020–0008

The Honorable David P. Ross
Assistant Administrator, Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington DC 20460

Re: Request for Comment on Whether EPA's Approval of a Clean Water Act Section 404 Program Is Non-Discretionary for Purposes of Endangered Species Act Section 7 Consultation (published at 85 Fed. Reg. 30,953)

Dear Assistant Administrator Ross:

On behalf of the Florida Department of Environmental Protection, I write in strong support of reconsideration of whether EPA should engage in consultation under Section 7 of the Endangered Species Act (ESA) as part of EPA's review of a state assumption application under Section 404 of the Clean Water Act (CWA). Last year, as part of discussions with EPA about Florida's application for Section 404 Assumption, FDEP provided a White Paper explaining why Section 7 consultation is applicable to EPA's review of FDEP's 404 assumption application. For the reasons uniquely applicable to State 404 assumption as set forth in the FDEP White Paper and the Federal Register notice, we believe EPA should determine that ESA Section 7 consultation is triggered when determining whether to grant a state's application for assumption. As part of that reconsideration, FDEP also recommends that EPA clarify that this analysis does not require Section 7 consultation for a variety of other permitting contexts such as nationwide permits under Section 404(e).

Update on Florida's 404 Assumption Process

FDEP received legislative approval to pursue assumption of the Section 404 permitting program in 2018. During the last two years, FDEP has collaborated with multiple state and federal agencies and stakeholders including Tribes, environmental organizations, and prospective permittees in preparing a program package FDEP intends to submit to EPA this summer. FDEP expects all regulations for the implementation of the program to be adopted under the state rulemaking process by July 3, 2020. The biological assessment, which FDEP is preparing on

behalf of EPA for purposes of obtaining a programmatic consultation under Section 7 of the Endangered Species Act, is likewise in its final stages and expected to be completed by early July.

Reasons to Support Reconsideration

State assumption of the Section 404 program is an important part of the CWA's cooperative federalism structure. Assumption can streamline permitting processes, reduce duplication of effort and overall expenditures by state and federal authorities, and better align the Section 404 program with other CWA programs for which states have authority. Virtually all states have delegated authority to administer the National Pollutant Discharge Elimination System permit program under CWA Section 402, as well as permitting programs under the Clean Air Act and other major environmental statutes. However, only two states have assumed authority for the CWA Section 404 program: Michigan in 1984 and New Jersey in 1994.

Recently, states have expressed renewed interest in the benefits of state assumption under Section 404. In response, the federal government has undertaken a review of various policies impacting state 404 assumption. As one part of that effort, EPA is reviewing whether to integrate ESA Section 7 consultation into the assumption application process, a step that would further help to streamline permitting requirements in a manner consistent with the ESA and CWA.

Under this approach, EPA would engage in a one-time ESA Section 7 programmatic consultation with the Services in connection with the initial review of a state's 404 assumption application. This would allow the Services to issue a programmatic Biological Opinion ("BiOp") and a programmatic incidental take statement ("ITS"). The BiOp with ITS would identify procedural requirements for state 404 permits. These would support the Services' determination that assumption would not result in jeopardy to any listed species and would bring that state's 404 permits within Section 7's exemption from take liability.

This streamlined permitting process, which would reduce costs and duplication of effort by state and federal authorities while also ensuring protection of species, is supported by statutory text, legislative history, and policy, and will not adversely impact EPA obligations under other delegation statutes.

Implications Related to Nationwide Permits

Importantly, because of the unique considerations arising under Section 404(g)-(h), section 7 consultation for State 404 Assumption does not also require consultation in a variety of other contexts such as nationwide permits. Those other contexts are quite different than state assumption determinations in ways that are directly relevant to evaluating whether Section 7 consultation is required. FDEP urges EPA to clarify this important distinction in its ultimate decision that results from this reconsideration.

By way of background, on April 15, 2020, a federal district court in Montana ruled that the U.S. Army Corps of Engineers ("Corps") violated the ESA by failing to engage in Section 7 formal consultation when it reissued Nationwide Permit 12 ("NWP 12"). Originally issued in 1977 and reissued in 2017, NWP 12 is a Corps' permit that authorizes discharges of dredged or fill

material into waters of the United States for construction, maintenance, repair, and removal of oil and gas pipelines, transmission lines, and associated facilities. In response to a lawsuit challenging a major pipeline project utilizing NWP 12, the district court ruled that the Corps failed to complete consultation under ESA Section 7(a)(2) before reissuing NWP 12. The court vacated (and blocked the use of) NWP 12 pending completion of Section 7 consultation. This decision is highly controversial and subject to ongoing litigation and appeals.

Section 7 consultation for State 404 Assumption does not undermine the Corps' position that the reissuance of NWP 12 does not require Section 7 consultation. In fact, the two positions are consistent in that they both maintain that Section 7 consultation is only necessary under the ESA when a federal action may affect listed species or critical habitat. In the case of State 404 Assumption, listed species or critical habitat may be affected depending on the state's particular application and program as well as the listed species and critical habitat located within the state that may be affected by state-issued 404 permits. For example, when New Jersey applied for 404 assumption, EPA engaged in informal Section 7 consultation and concluded that the assumption by New Jersey of the 404 program would not adversely affect listed species or critical habitat in that context. Likewise, in the case of nationwide permits, endangered species may or may not be affected depending on the whether the nationwide permittees avoid impacting endangered species. NWP 12, in particular, covers minor wetlands impacts (less than ½ acre impacts) and does not authorize any activity that "might affect listed species or critical habitat" unless the Corps makes a "no effect" determination or completes Section 7 consultation on a site-specific basis.[1] The threshold question in both situations is whether the agency action affects endangered species.

Notwithstanding the fact that the issuance of nationwide permits and State 404 Assumptions share identical threshold questions, there are several fundamental differences between the two actions. For example, nationwide permits typically only cover certain categories of activities with "minimal" adverse environmental effects, whereas State 404 Programs take over permitting with respect to any and all activities subject to Section 404 of the CWA in the State. Likewise, for NWPs, the Corps retains full control of the permit program. The conditions in NWP 12 provide for Corps' control of consultation wherever warranted. In fact, the Corps has stated that it has engaged in thousands of Section 7 consultations for specific activities under nationwide permits. For State 404 Programs, the federal agencies transfer authority to the State for the entire permit program for all "assumable" waters. Though subject to EPA oversight, the State issues the permits and decides how species issues are addressed. Under FDEP's proposed approach, the biological opinion issued by the U.S. Fish & Wildlife Service to EPA in conjunction with the 404 Assumption determination would establish the terms and conditions to ensure no jeopardy/adverse modification when the State issues 404 permits.

[1] It is accepted that Army Corps permits of all kinds – individual, general, NWPs, etc. – may trigger formal consultation depending upon the circumstances (i.e., whenever an activity is likely to adversely affect listed species/habitat), but the Corps has chosen to impose conditions on NWP 12 (and certain other nationwide permits) to avoid impacts to species unless formal consultation is used.

EPA's reconsideration of its legal position in the "Silvia Memo" has no bearing on the factual question of whether NWP 12 (or any other nationwide permit) *may affect* endangered species. The Silva Memo, which EPA is currently reconsidering, evaluates the legal issue of whether Section 7 consultation is triggered for state delegation statutes in light of the Supreme Court's decision in *NAHB v. Defenders of Wildlife*, 551 U.S. 644, 671 (2007). That legal question is simply not applicable to whether the issuance of nationwide permits may affect endangered species. Delegation/assumption statutes – such as Section 402 of the Clean Water Act for NPDES delegation and Section 404(g)-(h) for Section 404 State Assumption – provide that EPA "shall" approve delegation/assumption based on the listed criteria in the statute. In light of this "shall" language, the Supreme Court has made clear that additional factors – like Section 7 consultation – are not applicable to delegation statutes unless the delegation statute itself gives the agency the discretion to consider impacts to species as an end in itself. Of course, for other actions like the issuance of nationwide permits (for which Congress has not mandated issuance based on an exclusive list of factors or criteria), the *NAHB* analysis is not applicable.

In *NAHB*, the Supreme Court found that Section 402's delegation criteria did not encompass species impacts and, thus, did not trigger ESA consultation. The FDEP White Paper explains why Section 404(g)-(h), which requires EPA to make an assumption determination, gives EPA discretion to consider impacts to species, and thus, triggers Section 7 consultation. This threshold legal question is not applicable to whether the issuance of nationwide permits may affect endangered species. Section 404(e), which is the statute authorizing the issuance of nationwide permits, states that the Army Corps "may" issue nationwide permits. Unlike Section 402's delegation criteria or Section 404(h)'s assumption criteria, there is clearly no obligation in Section 404(e) to issue NWPs or to limit the issuance decision to certain required criteria. As previously stated, the Army Corps' issuance of all permits, including nationwide permit, may require formal consultation *if the issuance of that permit is likely to adversely affect listed species.*[2]

This understanding is reinforced by other recent federal government positions. On June 16, 2020, the Solicitor General (SG) filed an application with the U.S. Supreme Court to stay the NWP 12 injunction imposed by the federal district court in Montana. Explaining why the district court incorrectly applied the ESA's requirements, the Solicitor General stated: "The Corps reasonably determined that merely re-issuing NWP 12 would have no effect on listed species or critical habitat -- and therefore did not trigger any consultation requirement under the ESA -- because the regulatory scheme *and conditions in NWP 12 ensure that any necessary consultation occurs on an activity-specific basis*" (page 4, emphasis added). He further explained that the "Corps reasonably determined that, in light of the regulatory scheme and permitting conditions, the mere re-issuance of NWP 12 itself would have 'no effect' on protected species or critical habitat"

[2] Nor is the FDEP White Paper inconsistent with *National Wildlife Federation v. Dept. of Transportation*, No. 19-1609/10 (6th Cir. June 5, 2020), where the Sixth Circuit recently held that Section 7 consultation is not triggered by the U.S. Coast Guard's approval of spill plans under the Clean Water Act. In the relevant section of the CWA, 33 USC 1321(j)(5)(D), the approval criteria does not provide for the protection of listed species as an end in itself. In fact, unlike the criteria in Section 404(h), there is no mention whatsoever of species in the criteria for spill plan approvals.

(page 29) and that, "in doing so, the Corps relied principally on General Condition 18," which allows the Corps to determine "whether consultation is in fact required on an activity-specific basis" (page 29). Additionally, the SG explains "[p]rogrammatic consultation about an agency action may be appropriate when a proposed agency action provides a framework for future proposed actions," (page 30, citing 50 C.F.R. 402.02), but also explains that the ESA "does not require consultation for any framework programmatic action *that has no effect on listed species or critical habitat*" (page 30, emphasis added), and that the "Corps made such a 'no effect' determination here" (page 30). In setting forth these points, the Solicitor General saw no need to cite or discuss the *NAHB* case or other issues uniquely applicable to EPA's approval of state delegation/assumption programs. The NAHB analysis at issue in the Silva Memo reconsideration is simply not applicable to the very different ESA consultation questions that arise in the NWP 12 litigation.

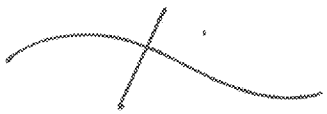
Given the importance of these issues, FDEP recommends that EPA address the legal reasons distinguishing Section 7 consultation for the unique circumstances arising under state 404 assumption from consultation for the issuance of nationwide permits.

In closing, Florida greatly appreciates EPA's strong leadership on cooperative federalism, environmental protection, and the rule of law. We strongly urge EPA, as part of its ongoing review of FDEP's application for Section 404 assumption, to complete the reconsideration of the "Silva Memo" and conclude that consultation for this purpose is lawful and appropriate.

FDEP stands ready to work with EPA to complete the assumption process in a timely manner in full accordance with law.

Thank you for your kind consideration of these comments.

Sincerely,



Noah Valenstein
Secretary